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Apportionment: Longway v. Jefferson County Board of Supervisors

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NEW YORK STATE CONSTITUTIONAL DECISIONS: 1993 COMPILATION

APPORTIONMENT

N.Y. CONST. art. II § 4:

For the purpose of voting, no person shall be deemed to have gained or lost residence, by reason of his presence or absence, while employed in the service of the United States; nor while engaged in the navigation of the waters of this state, or of the United States , or of the high seas; nor while a student of any seminary of learning; nor while kept at any almshouse, or by charity; nor while confined in any public prison.

COURT OF APPEALS

Longway v. Jefferson County Board of Supervisors[1]
(decided December 16, 1993)

The New York Court of Appeals unanimously answered a certified question from the Federal Court of Appeals, Second Circuit, indicating that the use of the term "population" in the Municipal Home Rule Law Section 10 (1)(ii)(a)(13)(c) does not necessarily exclude transient residents including military

1. 83 N.Y.2d 17, 628 N.E.2d 1316, 607 N.Y.S.2d 606 (1993).

personnel and their dependents, incarcerated felons, and occupants of group homes.[2]

The action was first brought in the Federal District Court for the Northern District of New York pursuant to 42 U.S.C. § 1983.[3] The plaintiffs, members of the Jefferson County Board of Supervisors and a resident of Jefferson County who was not part of that board, sued on behalf of several towns and wards of the city of Waterford.[4] The plaintiffs requested that the federal court compel Jefferson County to adopt an apportionment plan that conformed to constitutional requirements. They alleged that the current plan which was based upon 1990 Federal Census data, impermissibly counted transient non-residents in population totals used by the county to form their electoral districts.[5] This, the plaintiffs contend, diluted the vote of the residents of Jefferson County thus violating their constitutional right to equal protection under the law.[6] The federal district court granted the defendant's motion for summary judgment, dismissing the plaintiff's complaint and the plaintiffs appealed to the court of appeals.[7] That court in turn determined that the federal constitutional issues indicated in the case might be rendered moot once the statutory construction was interpreted by the New York

2. *Id.* at 19, 628 N.E.2d at 1316, 607 N.Y.S.2d at 606. The New York Court of Appeals was able to accept such a certified question upon the authority of title 22 of the New York Code of Rules and Regulations § 500.17, which allows the United States Supreme Court or Federal Courts of Appeals or other courts of last resort to certify "determinative questions of New York law . . . for which there [are] no controlling precedent of the Court of Appeals." *Id.* at 20, 628 N.E.2d at 1317, 606 N.Y.S.2d at 607; *see also* N.Y. COMP. CODES R.& REGS. tit. 22, § 500.17(a) (1990).

3. Longway v. Jefferson County Bd. of Supervisors, 995 F.2d 12 (2d Cir. 1993).

4. *Id.* at 14.

5. *Id.*

6. *Id.* The plaintiffs rely on both a federal constitutional argument and state statutory arguments. *Id.*

7. Longway v. Jefferson County Bd. of Supervisors, 83 N.Y.2d 17, 20, 628 N.E.2d 1316, 1317, 607 N.Y.S.2d 606, 607 (1993).

Court of Appeals and certified the question which is the subject of this New York Court of Appeals decision.[8]

The question certified by the Second Circuit was: "Whether, for purposes of local legislative apportionment, "population," defined as "residents, citizens, or registered voters," New York Municipal Home Rule Law, necessarily excludes transients, such as military personnel, incarcerated felons, and occupants of group homes."[9]

The New York Court of Appeals approached the question by first reviewing the federal case law which informs all apportionment and redistricting processes of constitutional guidelines. Recalling *Reynolds v. Sims*[10] and its progeny, the *Longway* court reviewed the "one man, one vote" doctrine which states that the Fourteenth Amendment's Equal Protection Clause requires that all law making bodies be comprised of representatives who represent substantially equal populations.[11]

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8. 995 F.2d at 14-15. The Second Circuit concluded that the issue was ripe for review. *Id.* at 13. The court further determined that a certified question was necessary because whatever plan Jefferson County, a local governmental structure, finally put into place it would be a plan which relied upon the definition of "population" as the New York Municipal Home Rule Law included that term. It is the state legislature's policies and laws which govern the permissibility of different methods of apportionment and districting plans, so long as these plans remain within the boundaries of what it acceptable under the federal constitution. The issue presented in the instant case concerning the definition of population for purposes of apportionment was likely to reoccur, thus the federal appeals court certified the question to the highest state court. *Id.* at 15.

9. *Id.* at 14.

10. 377 U.S. 533 (1964).

11. 83 N.Y.2d at 21-22; *see also* Avery v. Midland County, 390 U.S. 474 (1968). The court held that the one man, one vote principle enunciated in *Reynolds* must be extended to all local governing bodies which command general governmental functions, thus allowing novel forms of local government with the only constitutional restriction being that all who are governed must retain an equal voice in the representative process. *Id.* at 481-82. Iannucci v. Board of Supervisors, 20 N.Y.2d 244, 229 N.E.2d 195, 282 N.Y.S.2d 502 (1967). The *Iannucci* court held that the one man, one vote rule created by *Reynolds*, and extended to local governments in *Avery*, was applicable to county level supervisory boards. *Id.* at 249, 229 N.E.2d at 197, 282 N.Y.S.2d at 506. The court concluded that county governmental boards had to be elected

The *Longway* court further reiterated the Supreme Court's advisory in *Avery v. Midland County*[12] that "indicated that 'the Constitution does not require that a uniform straightjacket bind citizens in devising mechanisms of local government suitable for local needs and efficient in solving local problems.'"[13]

From the federal and state precedents addressing the issue of apportionment, the *Longway* court extrapolated a theme of flexibility within constitutionally permissible perimeters.[14] The court stated that the Municipal Home Rule which it here undertook to interpret "embodies the sentiment of the Supreme Court that flexibility is key . . . ."[15] With this said, the *Longway* court continued to recount that neither in *Reynolds*, nor in any other apportionment case had the Supreme Court ever held that aliens, transients, temporary residents, or felons denied the right to vote had to be necessarily included in the population count upon which electoral districts are drawn in order to satisfy the Equal Protection Clause of the Fourteenth Amendment.[16] In the absence of any constitutional requirement, the court expressed the belief that such a determination of exclusion or inclusion is one left to the wisdom of state legislatures.[17] This assertion was supported by the Supreme Court's holding in *Burns v. Richardson*[18] where the court stated that "[t]he decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is

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using districts which were apportioned based upon substantially equal populations, and challenges to the apportionment process created a burden upon such board to prove that their election was constitutionally proper. *Id.* at 253, 229 N.E.2d at 199, 282 N.Y.S.2d at 509.

12. 390 U.S. 474.

13. 83 N.Y.2d 17, 21, 628 N.E.2d 1316, 1318, 607 N.Y.S.2d 606, 608 (1993) (quoting *Avery*, 390 U.S. at 485).

14. 83 N.Y.2d at 20-21, 628 N.E.2d at 1317, 607 N.Y.S.2d at 607.

15. *Id.* at 21, 628 N.E.2d at 1317, 607 N.Y.S.2d at 607.

16. *Id.* at 21, 628 N.E.2d at 1318, 607 N.Y.S.2d at 608.

17. *Id.*

18. 384 U.S. 73 (1966) (holding that while the use of registered voters was possibly suspicious it was not constitutionally barred as a means of determining the population for apportionment purposes).

one the Constitution forbids, the resulting apportionment base offends no constitutional bar . . . ."[19]

The *Longway* court mentioned a case in which the Supreme Court struck down a State Constitution's provision which categorically disallowed a segment of one state's transient population. In *Carrington v. Rash*,[20] the high court invalidated a portion of the Texas constitution which prohibited all military personnel who move to that state while serving the country from exercising their right to vote in that state while enlisted.[21] The *Carrington* Court sympathized with the burdens placed on the state in having to determine who is and who is not a rightful citizen of Texas. However, the Court held that the irrebuttable presumption that military personnel, who relocated to the state while in the service, cannot be included in the electoral process, despite proof that Texas was their new domicile unconstitutionally interfered with those military persons' fundamental right to vote.[22] Again, the *Longway* court noted the trend toward inclusion where enfranchisement issues were concerned even when concerning transient populations.[23]

Other federal law to which the *Longway* court looked to for guidance included *Greenwald v. Board of Advisors of the County of Sullivan*[24] In this New York based federal case the district court held that the inclusion of college students living in group homes or dormitories as well as others living in group homes, such as drug rehabilitation centers and federally financed jobs corps housing provisions, was erroneous and that the population base should be recounted without these transient residents.[25] The *Greenwald* court stated that in its opinion "residence [was] a

19. *Id.* at 92 (citations omitted).

20. 380 U.S. 89 (1965).

21. *Id.* at 96.

22. *Id.*

23. Longway v. Jefferson County Bd. of Supervisors, 83 N.Y.2d 17, 20, 628 N.E.2d 1316, 1317, 607 N.Y.S.2d 606, 607 (1993).

24. 567 F. Supp. 200 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 1434 (2d Cir. 1983).

25. *Id.* at 208.

matter of state and not federal law."[26] Still, the *Greenwald* court continued to analyze New York's statutory law regarding residency and the New York constitutional provisions it found instructive. The defendants in the *Longway* case contended that "*Greenwald* [was] bad law" and asked the Second Circuit to overturn that decision.[27]

The district court in *Greenwald* examined the Municipal Home Rule Law which commands counties to apportion their voter ship population including "residents, citizens, or registered voters."[28] That court pointed to the fact that the Municipal Home Rule Law failed to define "resident" and set out to determine whether the defendant's or plaintiffs' preferred definition should prevail.[29] The New York Constitution article II, Section 4 provides that "[f]or purposes of voting, no person shall be deemed to have gained or lost a residence by reason of his presence or absence . . . while a student, . . . nor while kept at any almshouse, or other asylum, or institution,; . . . nor while confined in any public prison."[30] The holding of the *Greenwald* court rests upon the fact that the court interpreted the issue before it as one upon which this section of the New York Constitution is relevant.[31] Accordingly, the *Greenwald* court held that mere presence in Sullivan County was not enough to establish residence when the presence of persons was due to fact that they were students or residents of group home facilities.[32] Rather, the court held that article II, section 4 of the New York State Constitution required that transient residents of the county

26. *Id.* at 207.

27. Longway v. Jefferson County Bd. of Supervisors, 995 F.2d 12, 14 (2d Cir. 1993).

28. N.Y. MUN. HOME RULE LAW § 10(1)(a)(13) (McKinney 1993).

29. In *Greenwald*, the defendant county contented that all those counted in the federal census were considered residents as the New York statute intended that term, whereas the plaintiffs contended that transient residents ought not to be considered residents for the purposes of apportionment population counts because they do not intend to remain in the county, and therefore have little stake in the local political process. 567 F. Supp. at 207-09.

30. N.Y. CONST. art. II, § 4.

31. 567 F. Supp. at 208.

32. *Id.*

provide proof of intention to remain in order to be considered residents of the county thereby entitling them to be counted in the population which provides the basis of an apportionment plan.[33] Thus, residence for the purposes of apportionment, was, in the view of the *Greenwald* court, synonymous with domicile.[34]

It was precisely that conclusion of statutory interpretation to which the defendants in *Longway* object and upon which the plaintiffs in *Longway* rely. The *Longway* court agreed with the defendants that residents were not the same as domiciliaries and must not be held to the same requirements before being included in the population count.[35] The *Longway* court pointed out that the New York Constitutional provisions to which the *Greenwald* court referred address the right of citizens of the state to not have their right to vote interfered with when they leave their permanent residence to be a student, or temporarily reside in a hospital or other institution.[36] This state constitutional protection, the *Longway* court held, is not the same as a right to be counted in the calculation of the population base for purposes of apportionment.[37]

The *Longway* court remained unconvinced by plaintiffs argument that its own decision in *Seaman v. Fedourich*[38] supported its contentions.[39] The *Seaman* case held that patients at

33. *Id.*

34. *Id.* at 207. The *Greenwald* court supports this conclusion by pointing to New York State Constitution article II, § 1 which provides that he who has "been a resident of this state, and of the county, city and village for three months next preceding an election" may vote in a New York State election. The court concluded that the state constitution used the word "resident" as being analogous to "domiciliary," thus inferring that the state legislature intended that same interpretation to apply to the term "resident" as it appears in the Municipal Home Rule Law at issue in that case. *Id.*

35. Longway v. Jefferson County Bd. of Supervisors, 83 N.Y.2d 17, 22, 628 N.E.2d 1316, 1318, 607 N.Y.S.2d 606, 608 (1993). Therefore, the New York Court of Appeals in deciding *Longway* has suggested to the Second Circuit that *Greenwald* is, as the defendants contend, bad law and should be overturned. *Id.*

36. *Id.* at 23-24, 628 N.E.2d at 1319, 607 N.Y.S.2d at 609.

37. *Id.*

38. 16 N.Y.2d 94, 209 N.E.2d 778, 262 N.Y.S.2d 444 (1965).

39. 83 N.Y.2d at 23, 628 N.E.2d at 1319, 607 N.Y.S.2d at 609.

a state hospital in the municipality in question should be included in the population count upon which apportionment and electoral districting was to be conducted.[40] That court further held that in order to exclude such patients a case by case analysis of each patient's previous address and location for participation in past elections must be considered to eliminate the possibility that a specific patient rightfully belongs included in that population.[41] Again, there is evidence of a preference for inclusion of transient residents in population tabulations; a point observed by the *Longway* court as well.[42]

The *Longway* court not only disagreed with plaintiffs assertion that *Seaman* supported their contentions, but continued to outright disagree with the Appellate Division, Third Department's holding in *Davis v. Board of Supervisors of the County of Clinton*[43] The *Davis* court held that felons incarcerated in the county should have been discounted from the population tabulation to be used for apportionment because their inclusion altered the representation of the electoral districts of the county.[44] The *Davis* court found that since the *Seaman* court required extra investigation before excluding state hospital patients from population data, it intended mandatory exclusion of such patients when their rightful residences were not located within the electoral district in question.[45] However, the *Longway* court found that the interpretation of *Seaman* preferred exclusion to inclusion, and therefore was a misinterpretation of the *Seaman* holding.[46] In fact, this interpretation of *Seaman* would instill an affirmative duty upon governmental bodies to justify inclusion of temporary residents such as those in issue in all of the cases discussed.[47]

40. 16 N.Y.2d at 103-04, 209 N.E.2d at 783, 262 N.Y.S.2d at 451.
41. *Id.* at 105, 209 N.E.2d at 784, 262 N.Y.S.2d at 452.
42. 83 N.Y.2d at 23, 628 N.E.2d at 1319, 607 N.Y.S.2d at 609.
43. 28 A.D. 583, 279 N.Y.S.2d 434 (3d Dep't 1967).
44. *Id.* at 584, 279 N.Y.S.2d at 436.
45. *Id.* at 583, 279 N.Y.S.2d at 436.
46. 83 N.Y.2d at 23, 628 N.E.2d at 1319, 607 N.Y.S.2d at 609.
47. *Id.*

The *Longway* court concluded its analysis of the certified question before it by addressing the different interests implicated by interfering with one's fundamental right to vote and the inclusion or exclusion of persons from population data used to reapportion and redistrict.[48] Returning again to the cornerstone case of *Reynolds*, the *Longway* court reminded its audience that even the Supreme Court recognized the impossibility of mathematical exactitude when dealing with apportionment and electoral districting issues.[49] Considering that truism and the fact that different "goals and objectives" are served by apportionment population tabulations as compared to direct restrictions on voting the *Longway* court concluded:

> Contrary to the . . . decision in *Greenwald*, there is no requirement in New York's Constitution or in the Municipal Home Rule Law that obligates a local legislature, in the context of apportionment, to use the same standards required for voting purposes, specifically, presence and the intent to remain. . . . [E]ven though certain citizens within a given population may not have the right to vote . . . that citizen nevertheless would properly be part of the population base for apportionment purposes.[50]

Thus, the New York Court of Appeals answered the question certified to it by the Federal Court of Appeals in the negative meaning that New York's law does not define "population" so as to necessarily exclude various transient residents. The trend is toward inclusion of such temporary residents for the purposes of tabulating population bases to be used in reapportionment and redistricting plans and exclusion should be based upon investigation on a case by case basis and the terms of such exclusion clearly expressed.

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48. *Id.* at 23-24, 628 N.E.2d at 1319, 607 N.Y.S.2d at 609.

49. *Id.* at 24, 628 N.E.2d at 1319, 607 N.Y.S.2d at 609 (quoting Reynolds v. Sims, 377 U.S. 533, 577 (1964)).

50. *Id.* at 24-25, 628 N.E.2d at 1320, 607 N.Y.S.2d at 610.